

Henry Colder Co., Inc. d/b/a Colders Furniture and Steven Wasechek. Case 30-CA-9854

July 21, 1992

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

On January 31, 1992, Administrative Law Judge Richard H. Beddow Jr. issued the attached supplemental decision on backpay.¹ The Respondent filed exceptions and a supporting brief and the General Counsel filed an answering brief to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders the Respondent, Henry Colder Co., Inc. d/b/a Colders Furniture, West Allis, Wisconsin, its officers, agents, successors, and assigns, shall take the action set forth in the Order, and make whole Steven Wasechek by payment to him of \$53,118, with interest.

¹The Board's original Decision and Order is reported at 292 NLRB 941 (1989), enf'd. 907 F.2d 765 (7th Cir. 1990).

Gerald McKinney, Esq., for the General Counsel.

Daniel G. Vilet, Esq., of Milwaukee, Wisconsin, for the Respondent.

SUPPLEMENTAL DECISION

I. STATEMENT OF THE CASE

RICHARD H. BEDDOW JR., Administrative Law Judge. This matter was heard in Milwaukee, Wisconsin, on November 19, 1991. Subsequently, a brief was filed by the Respondent.

The proceeding is based on backpay specifications dated October 22, 1990, which follow a decision of the Court of Appeals for the Seventh Circuit on July 25, 1990, enforcing in full the backpay provisions of the Board's Decision and Order dated February 9, 1989, reported at 292 NLRB 941 which decision ordered Respondent to make employee Steve Wasechek whole for any loss of pay suffered by reason of his unlawful discharge.

On review of the backpay specifications, as amended, Respondent's answer, and the evidence presented at the hearing, it appears that the primary issue presented is whether the discriminatee failed to pursue available work in "retail fur-

niture sales" and intentionally chose to pursue a new career and thereby failed to mitigate damages.

In addition, it is noted that evidence was presented at the hearing which adequately supports the presentation in the backpay specifications pertaining to claimed expenses accrued in Wasechek's search for work and claimed medical expenses.

These matters were not disputed on brief and I otherwise find that they properly are reimbursable under this record and its backpay specifications.

Discriminatee Wasechek graduated from Milton College in 1976 and then worked for 6 months as an interviewer at the state unemployment office and then for a year as a youth director at the Jamesville, Wisconsin Community Center. He became a sales representative for Plough Sales Corporation for nearly a year and then a security officer for AC Spark Plug for a period of about 5 years. In February 1983 he became a sales coordinator for Salico's Catering where he worked until joining the Respondent in September 1985.

When he was discriminatorily discharged November 4, 1987, Wasechek was one of Respondent's top salesmen, selling \$800,000 worth of furniture annually and ranking in the top 5 or 10 out of 30 to 35 sales employees. In 1987 his compensation while employed by the Respondent would have been \$49,000 on an annualized basis.

On November 9, shortly after his termination, Wasechek registered with state job services but received no referrals. On November 29 he unsuccessfully sought work at Groundwaters (a furniture store) where he knew one of its employees.

He started his job search on November 15, as indicated in his search for work report filed with the Board, which includes the following additional attempts, listed by quarter:

<i>Company</i>	<i>Position</i>	<i>Date</i>
<i>11/7/87-12/31/87</i>		
Abbey Medical	Medical sales	11/15
Knueppel Home Health	Home health sales	11/15
Al Dellavalle	Sales rep. (product unknown)	11/22
Systemic Support Systems	Medical sales	11/23
Medical Engineering	Medical sales	11/29
Spalding	Sales (product unknown)	12/06
RJ Medical Supply	Medical equipment sales	12/04
Spring Air	Wholesale mattress	12/13
Empire Distributing	Sales (product unknown)	12/20
<i>1/1/88-3/31/88</i>		
American Display	Sales—electric signs	1/5
Arthur Fulmer	Sales—motorcycle equip.	1/17
Colonial Hospital Supply	Sales—hospital supplies	1/17
Blind ad	Sales—unknown product	1/17
Burrows	Medical sales	1/24
Trek	Wholesale bicycle sales	1/24
Fujisawa, Smith & Kline	Financial sales	1/31
Waymar Medical	Medical equipment sales	2/8
Schwabb	Unknown	2/8
Medico-Mart	Medical product sales	2/14
Blind Ad	Unknown	2/21
R & M Distributing	Unknown	2/21
Devon Industries	Unknown	2/21
Shaw & Associates	Unknown	2/28

<i>Company</i>	<i>Position</i>	<i>Date</i>
Bristol Myers	Over the counter drug sales	2/28
Pro/Staff	Unknown	3/1
Muzak	Music sales	3/6
Health Call	Health industry sales	3/6
B-Z Engineering	Personnel-headhunting	3/11
Medrad	Medical product sales	3/20
	14/1/88-6/30/88	
Blind Ad	Unknown	4/3
DeMuth	Medical sales	4/10
Miracle Ear	Sales	4/29
Lincoln Tech	Sales-vocational training	8/2
	7/88-9/30/88	
Wininger Company	Sales-compressors	

In addition, Wasechek had two interviews with a local store called Furniture Venture Outlet in January 1988.

Wasechek was accepted for a week of training with American Display in January 1988, and he worked for them for a week in Cincinnati but left after it appeared he would not be assigned to work in the Milwaukee area, as had been represented. He sought and received a job as a sales representative for B-Z Engineering on May 16, 1988, where he was employed the remainder of 1988 and into 1989. The parties otherwise stipulated that the interim earnings for the first and second months of 1989 are not contested. On April 27, 1989, Respondent made a valid offer of reinstatement.

Respondent introduced a number of newspaper ads and Wasechek testified that while he had seen ads in the newspaper for major furniture stores in the Milwaukee area, including Steinhafel's and American, he did not apply there, because he previously had applied for a job at both employers in 1985 (while on temporary layoff from the Respondent) and had not been hired. He also said he was concerned that he would not be recommended favorably by Respondent to other principal competitor furniture stores in the area. Representatives of both of these stores testified they had jobs available during 1988, that Wasechek's resume would have been evaluated favorably, and that his past experience with a competitor would not be held against him. Both employers noted, however, that learning that Wasechek had been fired for cause might affect a decision on whether or not he would be hired as well as what questions they would ask and evaluate.

Wasechek testified that he looked for jobs in the Sunday newspaper ads and, in response to the Respondent's subpoena, he produced a large stack of Sunday help-wanted sections from the Milwaukee Journal which reflected his practice of circling jobs he was interested in pursuing. At the Courts' request only two representative sections of the newspaper were introduced into evidence, to avoid burdening the record. Respondent argues that its review of these sections of the newspaper reveal that Wasechek apparently ignored or failed to follow up on many sales positions for which he was qualified and that he ignored ads for retail sales positions, including a number of retail furniture sales positions.

A summary of the advertisements for retail furniture positions, prepared by one of Respondent's employees, which purports to show that over 150 advertisements for retail fur-

niture sales positions were placed in the Sunday Milwaukee Journal between November 1987 and April 1989, also was received into evidence.

II. DISCUSSION

As stated by the Board in *Fair Fashions*, 291 NLRB 586 at 587 (1988):

A discriminatee is required to make a reasonable search for work in order to mitigate loss of income and the amount of backpay. *Lizdale Knitting Mills*, 232 NLRB 592, 599 (1977). The Board and the courts hold however, that in seeking to mitigate loss of income a backpay claimant is "held . . . only to reasonable exertions in this regard, not the highest standard of diligence . . . The principle of mitigation of damages does not require success, it only requires an honest good faith effort. . . ." *NLRB v. Arduini Mfg. Co.*, 394 F.2d 420, 422-423 (1st Cir. 1968); *NLRB v. Madison Courier*, 472 F.2d 1307 (D.C. Cir. 1972). The Board and the courts also hold that the burden of proof is on the employer to show that the employee claimant failed to make such reasonable search. *NLRB v. Midwest Hanger Co.*, 550 F.2d 1101 (8th Cir. 1977), or that he willfully incurred losses of income or was otherwise unavailable for work during the backpay period. *NLRB v. Pugh & Barr, Inc.*, 231 F.2d 588 (4th Cir. 1956); *NLRB v. Miami Coca Cola Bottling Co.*, 360 F.2d 569 (5th Cir. 1966). Moreover, in applying these standards, all doubts should be resolved in favor of the claimant rather than the respondent wrongdoer. *United Aircraft Corp.*, 204 NLRB 1068 (1973).

What constitutes a good-faith search for work depends on the facts of each case. In this regard the Board stated:

that in broad terms a good-faith effort requires conduct consistent with an inclination to work and to be self-supporting and that such inclination is best evidenced not by a purely mechanical examination of the number or kind of applications for work which have been made, but rather by the sincerity and reasonableness of the efforts made by an individual in his circumstances to relieve his unemployment. Circumstances include the economic climate in which the individual operates, his skill and qualifications, his age, and his personal limitations.

The Respondent here essentially relies on the discriminatee's "skill and qualification" circumstances and contends that Wasechek was bound to seek essentially the same retail furniture sales work he was engaged in before being fired, citing a portion of *Madison Courier, Inc.*, supra, where the court said at 1318:

In order to be entitled to backpay, an employee must at least make "reasonable efforts to find new employment which is *substantially equivalent to the position [which he was discriminatorily deprived of] and is suitable to a person of his background and experience.*"

Here, it is apparent that Wasechek turned the emphasis of his job search to sales representative type jobs but he did not

totally reject any efforts in retail furniture sales having made attempts with at least two companies (Groundwater's in November 1987 and Furniture Venture Outlet in January 1988) as well as a wholesale mattress company in December 1987. Moreover, consideration must also be given to the fact that Wasechek was in retail furniture sales for only 2 years and had previously held sales representative positions, including one in the medical-related area, an area he again sought to pursue in his documented attempts to secure employment.

Here I find that a search for employment in the broad category of salesman for this particular individual is consistent with a good-faith search for comparable work as defined in *Fair Fashions*, supra. Wasechek was not a retail salesclerk but a salesman who had as much if not more experience as a sales representative than he did in retail furniture sales. While it may be that retail furniture sales jobs were being advertised, Wasechek speculated that such jobs, especially those with his former employers principal competitors Steinhafel's and American, would be unavailable to him if they learned of the circumstance of his discharge. In a like manner two possible employers Steinhafel's and American

testified and also speculated that Wasechek might have gotten a vacant position if they had accepted his qualifications over other applicants and his explanation of why he had been fired. This conflict of speculations should be decided against the interest of the wrongdoer and I find that Wasechek had a not unreasonable reluctance to pursue a job with local competitors of his former employer at a time when the personal files of this employer indicated that he had been terminated for cause. This reluctance by Wasechek was not a total abandonment of consideration of retail furniture sales employment and it was combined with a more active search for work as a sales representative, work that was comparable with his past work history and work that also was consistent with the broad area of skills required in salesmanship. (In this connection I also note that in each instance Wasechek's compensation was based substantially on commission.) Accordingly, I find that the discriminatee did embark on a reasonable and legitimate course of a search for comparable interim employment.

The backpay specifications involved here are as follows:

87/4	\$7,573	\$0	\$7,573	\$0	\$0	\$7,573
88/1	12,307	0	12,307	0	0	12,307
88/2	12,307	1,697	10,609	0	104	10,714
88/3	12,307	3,706	8,601	0	226	8,827
88/4	12,307	3,746	8,561	0	226	8,787
89/1	12,307	9,514	2,793	0	226	3,019
89/2	4,733	2,912	1,822	0	70	1,891
TOTALS	\$73,840	\$21,575	\$52,265	\$0	\$853	\$53,118

As can be seen above, the interim employment that Wasechek obtained did not reach the level of earnings he had reached with the Respondent. It is well established, however, that once a discriminatee has embarked on a legitimate course of interim employment, there is no duty to search for more lucrative interim employment, nor to engage in the most lucrative interim employment. See *F.E. Hazard, Ltd.*, 303 NLRB 839 (1991).

Here it appears that the initial commissions earned by Wasechek at his principal interim employment were not extensive, however, by the first quarter of 1989, he clearly had succeeded in getting started and was approaching the same level of earnings he had enjoyed at the time of his discriminatory discharge. Accordingly, I find that Wasechek's pursuit of and engagement in interim employment as a sales representative did not constitute willful failure to mitigate his losses, see *F.E. Hazard*, supra, and, under these circumstances, I conclude that Respondent has failed to meet its burden to establish that Wasechek did not make reasonable efforts to find substantially equivalent interim employment.

Under these circumstances, I further concluded that the gross backpay computations in the backpay specifications are the most accurate possible estimates of backpay and that Respondent has failed to establish any reasonable alternative

basis for a dimension of damages. Accordingly, total backpay owed discriminatee Wasechek by Respondent is \$53,118, exclusive of interest.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹

ORDER

The Respondent, Henry Colder Co., Inc. d/b/a Colders Furniture, West Allis, Wisconsin, its officers, agents, successors, and assigns, shall make whole Steve Wasechek by payment to him of \$53,118 as reimbursement for medical expenses and backpay, plus interest to the date of payment as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).²

¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

² Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest accrued before January 1, 1987, the effective date of the amendment) shall be computed as in *Florida Steel Corp.*, 231 NLRB 651 (1977).